UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

KHRG EMPLOYER, LLC, D/B/A HOTEL BURNHAM & ATWOOD CAFÉ

and

Case 13-CA-162485

UNITE HERE LOCAL 1, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S POST HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. Introduction and overview of the case

By October 2015, Respondent, KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Café[1], was fed up with server Evan Demma's continued efforts to organize employees at Respondent's properties. Demma was one of the Union's lead organizers. Demma was a Union committee member, wore his union button every day, regularly attended union meetings, had union cards signed, participated in about 30 demonstrations during the organizing campaign, and helped organize various groups of employees at the hotel and café. (Tr. 44-45). Most notably, on October 9, 2015, Demma helped organize the Union's largest demonstration at Respondent's facility. (Tr. 48). Around a hundred people participated in the demonstration on that day. (Tr. 48). The demonstration was held shortly after Labor Day and mainly took place on the public sidewalk in front of Respondent's facility. (Tr. 47). The goal was to bring critical issues about Respondent's housekeepers' terms and conditions of employment to management's attention. (Tr. 47; 170). During the demonstration, Demma and other individuals he knew from the hotel and the Union, delivered a petition to hotel general manager Tonya Scott. (Tr. 51). The petition detailed the excessive pains experienced by housekeeping employees. (GC 3). To deliver the petition, Demma entered the hotel with approximately twenty other individuals and went to the non-public area of the hotel where Scott's office is located. (Tr. 95). Of this group, four of these individuals were Respondent's employees, about seven of them worked for the Hotel Monaco—a Kimpton property and the remaining individuals Demma knew from the Union office or they worked at other Kimpton properties. (Tr. 95-96). After peacefully and without incident

[1] In this brief, KHRG Employer LLC, d/b/a Hotel Burnham & Atwood Café, will be referred to as "Respondent;" UNITE HERE, Local 1, AFL-CIO will be referred to as the "Union," and the National Labor Relations Board will be referred to as "the Board." With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

delivering the petition to Scott, the group quietly left Respondent's premises and rejoined the demonstration. (Tr. 62).

Two weeks after delivering the petition, an activity with a long history of protection under the Act, Demma was terminated. (Tr. 80-82). The routine action of using his employee code so that Demma and his guests could gain access into the basement area of the Hotel is what Respondent relied on to justify Demma's termination. (Tr. 265-67). Demma's miniscule act has been accepted for years at Respondent's facility. Even if not an accepted practice, his actions were nowhere near egregious. Particularly when it is so clearly part of unquestionably, otherwise protected concerted activity. Respondent, apparently knowing this, conducted a sham investigation into Demma's actions to bolster its case against him. Instead of addressing Demma's legitimate concerns about the harassment he received from his co-workers following the delivery of the petition, Respondent used the tainted evidence from its investigation to target Demma for his protected activity. (Tr. 73-80). Thus, when Respondent terminated Demma, a vocal union supporter and leading advocate for his fellow workers, and did so expressly based on his actions that were part of the protected concerted activity of delivering a petition aimed at bettering the working conditions of his co-workers, Respondent violated Section 8(a)(1) of the Act.

II. Under well-established Board law Demma's termination clearly violated the Act

In order to determine whether Demma was discharged for protected concerted activity, it must first be established that Demma was, in fact, engaged in protected concerted activity. Once this is established, the next question in this case is whether Demma's protected concerted activity lost the protection of the Act. To forfeit the Act's protection Demma's conduct would need to be so egregious as to render him unfit for further employment. Thus, the legal inquiry is twofold.

The General Counsel submits that pursuant to this analysis, Demma's termination violated Section 8(a)(1) of the Act.

In order for an employee's activity to be "concerted," the Board requires "that activity must be engaged in, with, or on the authority of other employees and not solely by and on behalf of the employee himself." *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 252-53 (2006). It is beyond dispute from the facts of this case that Demma's conduct was concerted: he was delivering a petition to Respondent with a group of others, including co-workers. Accordingly, Demma was clearly engaged in concerted activity within the meaning of the Act.

With respect to the threshold question of whether Demma was engaged in "protected" activity, it is well established that employees, under Section 7 of the Act, have the protected right to draft and deliver petitions aimed at improving employees' working conditions. *Laguardia Assoc., LLP*, 357 NLRB 1097 (2011) (petition concerning layoffs); *Merit Contracting, Inc.*, 333 NLRB 562 (2001) (petition seeking better working conditions for out-of-town work assignments); *CleanPower, Inc.*, 316 NLRB 496 (1995) (petition concerning complaints of employees being overworked). That is precisely what occurred here and there can be no serious dispute about that fact.

Next, the Board has stated that "when an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Firch Baking Co.*, 232 NLRB 772 (1977); *Postal Service*, 250 NLRB 4 fn. 1, 5-6 (1980). Here, the General Counsel submits that because the act of entering the security code to allow non-employees to enter the area where Scott's office was part of the *res gestae* of the otherwise undisputedly protected activity, the question is whether this act was egregious enough

to lose the protection of the Act. For the reasons discussed below, the General Counsel submits that the evidence falls woefully short of demonstrating that Demma lost the protection of Act when he engaged in the activity at issue here.

In cases dealing with conduct that is part of the otherwise protected grievance related conduct, the Board has explained "[t]hat line 'is drawn between cases where employees engaged in concerted activities exceeds the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.'" *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 252-53 (2006) citing *Prescott Industrial Products Co.*, 205 NLRB 51 (1973).

For example, in *Hacienda Hotel, Inc.*, the Board determined that an employee's conduct of entering the Employer's hotel to lead a delegation during a time when he was not authorized to be there was protected conduct. *Hacienda Hotel, Inc.*, 348 NLRB 854, 865 (2006). There, despite having a rule which strictly prohibited employees from being on the Employer's premises thirty minutes before their shift, the Board determined that after entering the hotel there was nothing opprobrious about the employees behavior while meeting with management, thus there was no loss of protection. *Id.* Therefore, according to the Board, the "pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Id.,* 348 NLRB at 854 fn. 1, quoting *Stanford Hotel*, 344 NLRB 558, 558 (2005); see generally *Atlantic Steel Co.*, 245 NLRB 814 (1979).

Analyzing the case under the four-part test in *Atlantic Steel*, 245 NLRB 814, 816-817 (1979) leads to the same inexorable conclusion: Demma's conduct was not nearly so opprobrious to warrant the conclusion that his termination was lawful under the Act. Under *Atlantic Steel* the

Board uses four factors to make the determination: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices." *Id.*; *Datwyler Rubber & Plastics Co.*, 350 NLRB 669, 670 (2007). As will be detailed below, three of four *Atlantic Steel* factors clearly militate in favor of a finding that Demma did not lose the protection of the Act by the routine action of using a code to gain access through a door in order to deliver a petition to management.

III. Evan Demma was engaged in protected concerted activity

There is no question that on October 9, 2015 Demma was engaged in protected concerted activity. The cases cited above specifically address instances like the one here, where employees' actions of presenting petitions to management were both protected and concerted.

More specifically, on October 9, Demma and other members of the Union organizing committee prepared a petition concerning what they believed were sub-par working conditions that resulted in undue hardship and pain among the housekeeping employees. (GC 3). Shortly before leading a delegation to deliver the petition, Demma participated in a peaceful union demonstration outside of the hotel and restaurant in honor of Labor Day which had just passed. (Tr. 47). After marching with a picket sign for approximately thirty minutes, Demma, other hotel employees, and individuals he knew from the Union entered the hotel's main entrance to deliver the petition. (Tr. 51). The group consisted of approximately twenty individuals. (Tr. 53).

After entering through the main entrance of the hotel, they walked past the front desk and beyond the restaurant, down a flight of stairs and through a locked door leading to the manager's office. (Tr. 56). Through that door were the housekeeping office, kitchen area, and employee

break room.[2] (Tr. 56). Once the group passed the locked door, they quietly walked towards hotel general manager Tonya Scott's office. (Tr. 60). When they arrived, Scott immediately attempted to turn them away. (Tr. 60). Demma then explained that the group was only there to deliver the petition and asked that Scott respond to the petition by October 16. (Tr. 60-61). At that point the group was escorted out of the building by manager John Radosevich. (Tr. 61). The duration of the encounter with Scott lasted approximately two minutes and there is no competent evidence that any violence, profanity, or other insubordinate activity occurred. (Tr. 62).

These actions were both protected and concerted. The delegation was clearly concerted because Demma engaged in the activity with a group of other employees. The delivery of the petition was protected because the petition being delivered specifically addressed the terms and conditions of housekeeping employees employment. (GC 3). Accordingly, Demma was engaged in protected concerted activity both during the demonstration outside the hotel before delivering the petition, and when he actually took it to Scott's office.

IV. Demma was discharged for conduct that was a part of the *res gestae* of his protected concerted activities

Here, Respondent asserts that Demma was discharged for using his employee code to provide access to the back of the house for non-employees. (GC 7). Demma's use of the employee code occurred while in the course of delivering the petition. (Tr. 57). Given that the delivery of the petition is protected concerted activity, Demma was discharged for conduct that is part of the *res gestae* of protected concerted activities. See, e.g., *White Oak Manor,* 353 NLRB 795, 795 fn. 2 (2009), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010) enfd. 452 Fed.Appx. 374 (4th Cir. 2011)(employee's photographing of another employee deemed part

[2] This area is considered, the back of the house and is how it will be referred to throughout the brief.

of the *res gestae* of a concerted effort to induce group action concerning the enforcement of a dress code).

V. Demma's conduct was nowhere near egregious given that Respondent routinely allowed non-employees into the back of the house unattended

The act of entering an employee code to provide a group access into the back of the house was a widely accepted practice at Respondent's facility. Thus, this conduct comes nowhere near the type of egregious conduct the Board contemplates in these cases. Indeed, the very concept of "egregious" conduct begins with the premise that the conduct in question is somehow unacceptable. However, here, Demma's conduct cannot be considered unacceptable, or "misconduct" given how customary it was at Respondent's facility. There are several reasons why Demma's actions do not arise to the level of egregious conduct.

First, Respondent has routinely allowed non-employees access into the back of the house, thus Respondent cannot now argue that Demma's actions somehow arise to a breach of safety and security. Not only have employees granted non-employees access to the back of the house without being disciplined, but several non-employees have been provided the code in order to gain access into the area.

There are numerous examples describing when non-employees have been provided with the code to gain access to the back of the house or have been allowed into the back of the house unsupervised. Demma testified to witnessing non-employees gain access to the secured area about 15-20 times during his employment. (Tr. 84). Additionally, Demma has left his wife and daughter unattended in the back of the house using the same door that he used on October 9, 2015. (Tr. 87). Tufino, a housekeeper at Respondent's facility, also testified to allowing her family members into the back of the house on several occasions. (Tr. 190-91). On at least one occasion, Tufino said she left her daughter unattended in the back of the house. (Tr. 192).

Furthermore, managers have allowed their family into the same space without supervision. (Tr. 88; 256). Demma testified to seeing restaurant manager, Damien Palladino's partner access the secured area unaccompanied. (Tr. 88). This testimony was corroborated by Palladino. (Tr. 256). Demma also testified that on at least three or four occasions, Chef Brian Millman has allowed his wife and son access into the back of the house. (Tr. 89-90).

In addition to employees' relatives, Demma and Tufino testified to witnessing vendors use the code to go through the same door that was accessed on October 9, 2015. (Tr. 84-86, 90). Tufino even testified to holding the door open for vendors. (Tr. 193). On at least ten occasions, Demma said that vendors would leave the door propped open and unmonitored. (Tr. 92; 94). Tufino testified to witnessing an individual she had never seen before use the employee code to gain access through the secured door to deliver food. (Tr. 189). Additionally, Tufino said she has witnessed a non-employee who cares for the plants at Respondent's facility use the employee code on several occasions. (Tr. 190). Vendors are not employed by the hotel or restaurant. (Tr. 85-86). In fact, the restaurant manager, Palladino has no personal knowledge as to how vendors even receive the code to access the secured area. (Tr. 289). There were also several occasions where employees would leave the secured door propped open. (Tr. 93). In every instance described above, there was no punishment issued to employees for these actions. (Tr. 87, 192-93).

The evidence also reveals that in the past employees at other Kimpton hotel properties have had unfettered access to the back of the house. This is significant because close to half of the individuals that Demma granted access to on October 9, were Kimpton hotel employees. (Tr. 96). For example, Rachel Brumleve used to work at Hotel Palomar, which is a Kimpton property. (Tr. 217). Brumleve testified that her sister, a former chef at the Atwood Café, on

several occasions allowed her into the back of the house. (Tr. 219-20). Sometimes Brumleve would go down the stairs unaccompanied and through the kitchen to get to the back of the house. (Tr. 220-21). At other times Brumleve's sister would open the locked door for Brumleve and allow her into the back of the house. (Tr. 220-21). Tufino also testified that an employee named Maricela who works at the hotel Monoco, a Kimpton property, was also allowed access to the back of the house. (Tr. 174-175). While still employed by the hotel Monoco, Tufino saw Maricela in the employee only area at the Hotel Burnham. (Tr. 175). Maricela just happens to be one of the same individuals with the group that entered the back of the house on October 9, 2015, to deliver the petition. (Tr. 171-72). Thus, Respondent's claim that the group that delivered the petition was unauthorized is nothing more than a self-serving mischaracterization of the facts. (Tr. 30). A majority of the group that was with Demma has always been privileged to access the back of the house without issue, thus any safety or security concern Respondent claims simply must be pretext.

Each of these examples points to the myriad of past instances where Respondent has tolerated the same actions it now claims to be a breach of safety and security. Each individual described above appeared to have the proper authorization to be present in the back of the house. Based on Respondent's past practice the only requirement to gain authorization is to be provided the code by someone at the hotel or granted access by any employee.

Demma's termination form states that the reason he was terminated was because "he used a security code to provide access into the back of the house for non-employees . . . constitut[ing] a breach of safety and security". (GC 7). As discussed above, there is an abundance of evidence showing that other employees, including management, have used the security code to provide access into the back of the house for non-employees. In many of the instances described above,

non-employees were allowed to access the back of the house without any employees present to monitor their activities, which is clearly more of a threat to safety and security than in the instant circumstance where Demma and other employees were present at the time when non-employees were allowed in the back of the house. However, the record is devoid of any evidence that anyone was disciplined, yet alone terminated, for that conduct. (Tr. 87, 192-93).

Furthermore, as noted above, several vendors have the security code and leave the secured door unattended and propped open during delivery. (Tr. 92-94). An unmonitored door left propped open is an enormous breach of safety and security, yet management has never shown concern over such actions. Consider the massive number of unknown individuals that could gain (or have gained) access through the unmonitored open door at the hotel. Then consider a group being escorted by several hotel employees through the same door. It is disingenuous, at best, to claim that an unmonitored door left open is a *lesser* security concern than a group being escorted by one of Respondent's own employees, as was the case here. However, Respondent conveniently found the latter example suddenly warranted the most extreme discipline: termination, yet the former was okay.

Second, there was nothing about Demma's conduct that rendered him unfit for employment with Respondent. This is evident through the sham investigation conducted by Palladino. First, Palladino testified to reviewing the surveillance video over and over again, likely looking for something more damning than opening a locked door. (Tr. 256; R 3). It likely only took one viewing to determine who in fact opened the door, but Palladino was in search of something more. If Palladino was only concerned about the hotel's safety and security, then the investigation would have been completed on October 10, when he discovered exactly who entered the code to open the door and allow the petition-carrying delegation to enter. (Tr. 272).

However, the video did not reveal any egregious conduct. (R 3). Instead, it showed Demma allowing a group of individuals he knew, many of whom worked for the Kimpton Hotel properties, accessing the back of the house. (Tr. 95-97). If the video had shown egregious conduct, as Respondent claims, there would necessarily be other employees who received discipline for the so-called security breach, including employees of other Kimpton properties. Yet Demma was the only employee disciplined. Therefore, a more logical inference based on the facts of this case is that Palladino conducted a sham investigation in order to attempt to justify terminating an open union supporter who was consistently advocating on behalf of his fellow workers. This was all done under the guise of claiming that Demma's conduct somehow created a threat of safety and security.

In addition, other aspects of Respondent's investigation support the conclusion that the investigation was merely a subterfuge to try to justify Demma's termination. The investigation began a day after presentation of the petition, when Demma's co-workers chastised his actions via e-mail. (GC 4). Demma's co-workers sent him numerous harassing e-mails and copied members of management, including Palladino, informing the group of Demma's Union allegiance and ridiculing him for participating in protected actions. (GC 4). Demma felt harassed by these emails and immediately contacted Palladino in an effort to obtain Respondent's assistance. (Tr. 73-74; GC 5). However, while Demma was attempting to seek help and protection from the harassment, Palladino had already begun building a case against him. (Tr. 263). Instead of quickly responding to Demma's concerns about harassment, Palladino contacted some of the same individuals that chastised Demma to further bolster a decision to fire Demma for his conduct on October 9th. (Tr. 278). The same servers who disapproved of Demma's otherwise protected activity were essentially invited to "pile on" and help justify Respondent's

decision to terminate him. (Tr. 278). This is a particularly transparent effort to hide Respondent's unlawful motivation when one considers the fact that by the time these follow-up statements were written, Respondent had already viewed the tape and knew full well that Demma had entered the code to enter the back of the house. If that simple act were enough to justify termination, as Respondent claims, there is simply no need to get an additional statement or do any further investigation. While Respondent claimed in its opening statement that Respondent should not be criticized for conducting a thorough investigation, such an argument is widely off the mark when the investigation was plainly unnecessary under Respondent's own theory of the case.

Moreover, although Palladino claimed to conduct a thorough investigation, his investigation could not have been thorough because it did not include any insight from housekeeping employees—the only other employees actually present with Demma during the delivery of the petition. (Tr. 285-86). This was no coincidence. Palladino's decision was an intentional effort to appear to be investigating Demma's actions when actually he was doing nothing of the sort. Similarly, if Respondent suggests that Palladino had no authority over the housekeepers, the claim should be rejected. First, whoever Respondent authorizes to look into an incident that is allegedly so serious would surely be granted full authority to conduct a full investigation. Second, even assuming Palladino himself lacked authority over housekeepers, he obviously could have reported their conduct to another supervisor who did possess such authority. In fact, at least two employees that assisted Palladino in making the decision to terminate Demma, Angel Patterson and Yuliya Shegarfi, did not work in the restaurant. (Tr. 279; 284). Surely failing to stop or report individuals entering a secured area of the hotel is just as much of a safety and security concern as typing in a code to do the same. Yet no one questioned

why the other employees that participated in the delivery of the petition allowed for this delegation to occur, and not one of them were issued even so much as a warning. (Tr. 266-67). This is plainly because Respondent has a history of accepting this type of conduct and, as shown above, in fact does not believe it to be a breach of safety or security. (Tr. 279; 284). Based on these facts, it is evident that Respondent carefully orchestrated a sham investigation that would attempt to support an otherwise indefensible claim: that allowing a small group of non-employees to enter the back of the house was so egregious that it warranted summary termination.

Respondent will likely argue, as it did during opening arguments, that this case is similar to *Headwaters Resources, Inc.*, 27-CA-20922, a 2009 Advice Memorandum. The first critical failure concerning Respondent's reliance on this memo is that an Advice Memorandum is not binding precedent. *Midwest Television, Inc., d/b/a Kfmb Stations & Harry Clement*, 343 NLRB 748, 762 fn. 21 (2004). Rather, the Board has stated that "administrative law judges have a duty to apply established Board precedent, unless that precedent has been reversed by the Board itself or by the Supreme Court." *Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986); *Ford Motor Co*., 230 NLRB 716 (1977), enfd. 571 F.2d 993 (7th Cir 1978), affd. 441 U.S. 488 (1979).

Second, the facts in that Advice Memorandum are significantly distinguishable in many important ways. For one, in *Headwaters Resources, Inc.*, the Employer's facility had much tighter security restrictions than Respondent's facility does here. In that case, the Employer had specific procedures in place to gain access to its facility and there was no evidence to support a claim that they were not routinely followed. *Id.* at 6. Here, Palladino admitted that access through the door in question at Respondent's facility is quite loose. (Tr. 286). For this reason, and the reasons described above, the two cases cannot be compared. In addition, in *Headwaters*

Resources, Inc. the employees' activity was found unprotected because there, employees' engaged in union activity during their work time. *Id.* at 7. Here, Demma was not involved in the demonstration or delegation until after his work shift. (Tr. 47). Accordingly, although Respondent believes *Headwaters Resources, Inc.* offers a helpful analysis it simply does not, and has no bearing on the outcome of this case.

VI. Applying the Atlantic Steel four-factor test yields the same result – Respondent violated Section 8(a)(1) of the Act when it terminated employee Evan Demma

For cases involving confrontations with management that are part of otherwise protected activity, the Board has consistently recognized that employees only lose the protection of the Act by opprobrious conduct. *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). As noted above, the Board considers four factors to make this determination: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices." *Id.* Counsel for the General Counsel maintains that the application of the *Atlantic Steel* factors to this case reveals that Demma's actions did not remove him from the protections of the Act and a finding of an unlawful termination is appropriate. Specifically, three of four *Atlantic Steel* factors militate in favor of a finding that Demma did not lose the protection of the Act by the routine action of using a code to gain access through a door in order to deliver a petition to management.

In regard to the first *Atlantic Steel* factor, when the alleged outburst occurs in a place that does not disrupt the employer's work processes, then the factor favors protection. *Datwyler Rubber & Plastics, Inc*., supra, at 670. The place of discussion may weigh against protection of the Act when the conduct is targeted to disrupt workplace discipline or undermine the authority of a supervisor. *Daimler Chrysler*, 344 NLRB 1324, 1329 (2005). Here, there are several additional facts that support this factor weighing in favor of the Act's protection. First, Demma

testified that he chose the route the group took because it was the least disruptive route. (Tr. 56). Not only did choosing this route avoid interactions with hotel guests, it also prevented any disruption to services being provided in the restaurant. (Tr. 56). The lack of any exposure to customers certainly weighs in Demma's favor. *Wal-Mart Stores, Inc.*, 341 NLRB 796, 808 (2004). In fact, restaurant manager Damien Palladino even confirmed that other routes would have caused more disruption to Respondent's operations. (Tr. 289).

Second, upon entering through the door that leads to the back of the house, the group entered quietly, only spoke to General Manager Tonya Scott, and then quietly exited. (Tr. 60). The duration of this interaction in the basement took about two minutes. (Tr. 62). While there were some servers in the break room during this brief encounter with Ms. Scott, the group did not interact with them. (Tr. 62). In fact, Demma did not anticipate encountering servers while delivering the petition given that it was a busy time for the restaurant. (Tr. 61-62). Thus, this very short interaction in the hotel basement was not at all done to disrupt workplace discipline or undermine supervisory authority. In fact, there is no evidence that any type of disruption or undermining of authority occurred. Any suggestion to the contrary is not supported by the facts.

The second *Atlantic Steel* factor also strongly supports the General Counsel's case. As described above, the drafting and delivery of petitions aimed at improving employees' working conditions is a quintessential form of protected concerted activity. Thus for the reasons described in detail above, this factor strongly favors protection.

The third and fourth *Atlantic Steel* factors concern "the nature of the employee's outburst" and "whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Atlantic Steel*, supra, at 816-817. Although Demma's actions were not provoked by

Respondent's unfair labor practice, Demma did not engage in any outburst that would result in a loss of the Act's protection.

The *Atlantic Steel* balancing test is appropriate in circumstances where "an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities" as is the case here. *Stanford Hotel*, 344 NLRB 558 (2005) (citing *Aluminum Co. of America*, 338 NLRB 21 (2002). The type of conduct that is typically analyzed under the third factor involves vulgar language used by an employee or an employee's actions directed to management or the Employer. The Board also analyzes whether this conduct threatens harm to management or damage to Respondent's premises. *Random Acquisitions, LLC*, 357 NLRB 303, 316 (2011). Here, the analysis requires determining whether Demma's action of entering a code to allow a group of individuals into the back of the house created a threat of harm to management or damage to Respondent's premises. Because Respondent historically tolerates the same action on a routine basis, Demma's actions did not pose a threat of harm to management or damage to Respondent's premises.

The Board has held that where the Employer has a history of routinely tolerating profanity without any discipline, such conduct would not lose the Act's protection. *Traverse City Osteopathic Hospital,* 260 NLRB 1061, 1061 (Employees use of profanity calling fellow employees a "brown nosing suck ass," while engaging in protected activity, did not cause her to lose the Act's protection where the use of profanity at the employer's facility was not uncommon and had been tolerated in the past); *Coors Container Co.*, 238 NLRB 1312, 1320, 1438 (1978), enfd. 628 F.2d 1283, 1288 (1st Cir. 1980)(Employees engaged in protected activity did not lose the Act's protection by calling the Respondent's guards "mother fuckers," where the phrase was commonly used at its facility and there was no evidence that any employee had been discharged

solely for using obscenities.); *Corrections Corp. of America,* 347 NLRB 632, 636 (2006) (finding no loss of protection based on employee's profanity where similar language was common among supervisors and employees alike). Similar to the cases cited above, here Respondent routinely allowed non-employees access into the back of the house, which Respondent now claims warrants the highest possible form of discipline, termination, without any form of progressive discipline.

If Respondent argues that Demma's actions posed a threat of harm, then this argument is pretext given Respondent's continued tolerance of this same action in the past. The actual reason Respondent terminated Demma was because of his protected activity—namely the delivery of the petition on October 9, 2015. The October 9 delegation can be distinguished from similar delegations in the past because it was accompanied by the Union's largest demonstration at Respondent's facility. (Tr. 48-49). Such a large amount of Union support, would certainly suggest that Respondent's anti-union efforts were inadequate. Thus, Respondent needed to send a message. Based on the facts presented above, three of the *Atlantic Steel* factors lead to the inexorable conclusion that Respondent violated Section 8(a)(1) of the Act when it discharged Demma in retaliation for delivering a petition seeking to improve working conditions for employees.

VII. In the alternative, if the *Wright Line* test applies, Respondent's discharge of Evan Demma nonetheless violates Section 8(a)(1) of the Act, as alleged in the Complaint

Assuming arguendo that an analysis under *Wright Line,* 251 NLRB, 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is appropriate in this case, application of that test also proves Respondent violated the Act. Under *Wright Line* the General Counsel has the burden of establishing that protected conduct was a motivating factor in the Respondent's decision to suspend then discharge Demma. *Wright Line,* 251 NLRB 1083 (1980).

To sustain this burden, the General Counsel must show that (1) the employee was engaged in protected activity (2) the Employer had knowledge of the activity and (3) the activity was a substantial or motivating reason for the Employer's adverse action. Once this is established, the burden shifts to the Respondent to demonstrate that the suspension and discharge would have occurred for a legitimate reason regardless of the protected activities. As will be discussed below, under this test, the evidence strongly supports finding a violation because the evidence fails to support Respondent's claim that absent Demma's protected activity, the mere act of allowing a few non-employees to enter the secured area of the hotel would have caused Respondent to fire him.

As pointed out above, Demma engaged in protected concerted activities when he and other individuals delivered a petition concerning what they believed were sub-par working conditions that resulted in undue hardship and pain among the housekeeping employees. (GC 3). It is undisputed that Respondent had knowledge of Demma's protected concerted activities, for it was this knowledge that led to Respondent's adverse actions—the suspension then termination of Demma.

Animus can be inferred through the sham investigation Palladino conducted. *In Re Detroit Newspaper Agency*, 342 NLRB 1268, 1275 (2004) (where there is indicia of a sham investigation an inference of animus is warranted). First, Demma's termination form alleges that he was terminated for using his employee code. (GC 7). Palladino became aware of this on October 10. (Tr. 297). Thus, if this was the true reason for Demma's termination, the investigation should have stopped there. There was simply no logical reason to further "investigate" and doing so reveals that Respondent was simply bound and determined to find an excuse to rid itself of a key leader of efforts aimed at bettering the working conditions of

Respondent's employees. However, apparently even Palladino knew Demma's conduct of just entering the code was not sufficient to warrant termination. Therefore, Palladino limited his investigation to employees he knew would help him build a case against Demma. This included various employees from the harassing chain of e-mails that Demma began receiving on October 10. (GC 4; GC 9). As described above, not a single housekeeping employee was questioned about the events on October 9, not even those employees that participated in the delegation. Animus can thus be inferred by Palladino's sham investigation that only included employees he knew were anti-union and failed to include any employees who were with Demma during the delegation, as they were clearly pro-union and would not help build Palladino's case.

Additional factors that support Respondent's discriminatory motive include the timing of the adverse action, disparate treatment, and evidence that Respondents asserted reason for termination is pretextual. First, Demma was suspended six days after delivering the petition. (Tr. 77-79) Two weeks after delivering the petition he was terminated. (Tr. 80-82). The close timing between delivering the petition and Respondent's series of adverse actions support Respondent's discriminatory motive. Second, Respondent provided no evidence of other employees who were disciplined for allowing non-employees into the back of the house. Yet the record is replete with examples of past instances where employees have participated in the same conduct without punishment. This alone significantly underscores Respondent's discriminatory motive. Finally, Respondent's argument is pretext given that Respondent took no disciplinary action against anyone other than Demma. (Tr. 226). While Respondent could have taken action against any of the other hotel employees present, it failed to do so. These employees' failure to report or stop the delegation was just as much of a security breach as Demma using his employee code. However, Respondent suspended Demma while it tried to muster enough evidence to justify his

termination. Significantly though, the additional investigation obviously did not add anything to Respondent's case against Demma since Respondent settled on the one reason it had been aware of all along: that Demma was the one that opened the door and allowed a group of employees seeking to better the working conditions of the housekeeping employees.

Accordingly, even under *Wright Line*, a violation must be found here. Demma engaged in protected concerted activity that Respondent was clearly aware of; Respondent had considerable animus toward that activity; and Respondent failed to establish that it would have terminated Demma in the absence of that protected activity. Therefore The General Counsel respectfully submits that Demma's termination violated the Act.

VIII. The Board should Award, Search-for-work and work related-expenses regardless of whether these amounts exceed interim earnings

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation, costs in seeking or commuting to interim employment[3]; the cost of tools or uniforms required by an interim employer[4]; room and board when seeking employment and/or working away from home[5]; contractually required union dues and/or initiation fees, if not previously required while working for respondent[6]; and/or the cost of moving if required to assume interim employment.[7]

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect

[3] *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).
[4] *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).
[5] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).
[6] *Rainbow Coaches*, 280 NLRB 166, 190 (1986).
[7] *Coronet Foods, Inc.*, 322 NLRB 837, 837 (1997).

of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *West Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *North Slope Mech.*, 286 NLRB 633, 641 n.19 (1987).

Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work[8], but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (Sept. 30, 2014) (quoting *Phelps Dodge).* The current Board law dealing with

[8] *Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct.

Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful action- i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses are clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole . . ." *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[9] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on

[9] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 (1953).

these amounts. See *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

IX. Conclusion

It is respectfully submitted that the record evidence as set forth and argued above amply supports all of the allegations in the Complaint, and requires a finding that Respondent violated Section 8(a)(1) of the Act in the manner alleged. To remedy the violation, Respondent should be ordered to reinstate employee Evan Demma to his former position, or if that position no longer exists, to a substantially equivalent position, and make him whole for any loses suffered as a result of his unlawful discharge, including search-for-work expenses and compensating him for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and filing a report with the Regional Director of Region 13 allocating the backpay award to the appropriate calendar year(s). See *Tortillas Don Chavas*, 361 NLRB No. 10 slip op. at 1-6 (2014); See *AdvoServ of New Jersey*, 363 NLRB No. 143, *1 (2016) (Board "decided to require the Respondent, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, to file its report allocating backpay with the Regional Director, not the Social Security Administration."). Finally, Respondent should be required to post an appropriate Notice to Employees.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Brief to the Administrative Law Judge on Behalf of Counsel for the General Counsel** was electronically filed with the Division of Judges on June 24, 2016 and that true and correct copies of the document were served on the parties in the manner indicated below:

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